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80-1209

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CHRISTINE O'BISO,

Petitioner,

vs.

THE BOARD OF EDUCATION OF THE
BOROUGH OF LINCOLN PARK, MORRIS COUNTY.

PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the petitioner barred from asserting a claim against a public body under 42 U.S.C. §1983 as a result of the two year statute of limitations governing public entities as set out in the New Jersey Tort Claims Act, *N.J.S.A.* 59:8-8?

2. Was not the District Court required to utilize the six year state statute of limitations set forth in *N.J.S.A.* 2A:14-1 as the state law of limitations governing an analogous cause of action in New Jersey?

3. Did not the determination of the District Court that absent the New Jersey Tort Claims Act the six year statute of limitations would "seem to apply" mandate the application of the six year statute under *McNeese v. Bd. of Ed.*, 373 U.S. 668 (1963)?

4. Was not the utilization of the two year statutory period predicated upon the identity of the defendant a deviance from the standard set up by the Supreme Court, and does it not create an impermissible distinction between public bodies and individuals under 42 U.S.C. §1983 contrary to *Monell v. New York City Dept. of Soc. Serv.*, 437 U.S. 658 (1978)?

5. Was not the application of the two year statute of limitations predicated upon the identity of the defendant a form of qualified immunity for a public body such as was abolished in *Owen v. City of Independence,* 63 L.Ed2d, 673 (1980)?

6. Did not the Supreme Court express a view contrary to the District Court holding in this matter in *Board of Regents v. Tomaino,* 64 L.Ed.2d 440 (1980) by selecting the "most appropriate" state statute based upon the cause of action and not the identity of the defendant.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO.

CHRISTINE O'BISO

vs.

THE BOARD OF EDUCATION OF THE
BOROUGH OF LINCOLN PARK, MORRIS COUNTY.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Christine O'Biso, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Third Circuit entered on October 23, 1980, which decision affirmed the decision of the United States District Court for the District of New Jersey, dated December 3, 1979.

OPINIONS BELOW

The order affirming the judgment of the District Court entered by the United States Court of Appeals for the Third Circuit is unreported and is printed in the Appendix, *infra*, pp. 7a & 8a. The opinion of the United States District Court for the District of New Jersey is also unreported and is printed in the Appendix, *infra*, pp. 1a-6a.

The opinion of the Commissioner of Education of the State of New Jersey in an action brought by the petitioner prior to the instant litigation and the report of the hearing examiner leading to that decision are unreported and are printed in the Appendix, *infra*, pp. 10a-23a.

The decision of the State Board of Education affirming the decision of the Commissioner in this matter is unreported and is printed in the Appendix, *infra*, p. 24a.

The order of the Appellate Division of the Superior Court of the State of New Jersey denying the right to file a notice of appeal as within time in this matter is unreported, and is printed in the Appendix, *infra*, p. 25a.

A petition for certification to the Supreme Court of the State of New Jersey was denied on May 2, 1978.

JURISDICTION

The United States Court of Appeals for the Third Circuit entered an order of judgment on October 23, 1980. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

United States Statutes, 42 U.S.C. §1983.

§1983. CIVIL ACTION FOR DEPRIVATION OF RIGHTS

> Every person, who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the

jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

United States Statutes, 42 U.S.C. §1988.

§1988. PROCEEDINGS IN VINDICATION OF CIVIL RIGHTS

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS §§1681 et seq.], or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a pro-

vision of the United States Internal Revenue Code [26 USCS §§1 et seq.], or title VI of the Civil Rights Act of 1964 [42 USCS §§2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

New Jersey Statutes, *N.J.S.A.* 2A:14-1.

2A:14-1. 6 YEARS

Every action at law for trespass to real property, for any tortious injury to real or personal property, for taking, detaining, or converting personal property, for replevin of goods or chattels, for any tortious injury to the rights of another not stated in sections 2A:14-2 and 2A:14-3 of this Title, or for recovery upon a contractual claim or liability, express or implied, not under seal, or upon an account other than which concerns the trade or merchandise between merchant and merchant, their factors, agents and servants, shall be commenced within 6 years next after the cause of any such action shall have accrued.

This section shall not apply to any action for breach of any contract for sale governed by section 12A:2-725 of the New Jersey Statutes.

New Jersey Statutes, *N.J.S.A.* 59:8-8.

59:8-8. TIME FOR PRESENTATION OF CLAIMS

A claim relating to a cause of action for death or for injury to person or to property shall be presented as provided in this chapter not later than the ninetieth day after accrual of the cause of action. After the expiration of 6 months from the date notice of claim is received, the claimant may file suit in an appropriate

court of law. The claimant shall be forever barred from recovering against a public entity if:

a. He failed to file his claim with the public entity within 90 days of accrual of his claim except as otherwise provided in section 59:8-9; or

b. Two years have elapsed since the accrual of the claim; or

c. The claimant or his authorized representative entered into a settlement agreement with respect to the claim.

Nothing in this section shall prohibit an infant or incompetent person from commencing an action under this act within the time limitations contained herein, after his coming to or being of full age or sane mind.

New Jersey Statutes, *N.J.S.A.* 59:1-3.

59:1-3. DEFINITIONS . . .

"Injury" means death, injury to a person, damage to or loss of property or any other injury that a person may suffer that would be actionable if inflicted by a private person. . . .

New Jersey Statutes, *N.J.S.A.* 59:1-2.

59:1-2. LEGISLATIVE DECLARATION

The Legislature recognizes the inherently unfair and inequitable results which occur in the strict application of the traditional doctrine of sovereign immunity. On the other hand the Legislature recognizes that while a private entrepreneur may readily be held liable for negligence within the chosen ambit of his activity, the area within which government has the power to act for the public good is almost without limit and therefore government should not have the

duty to do everything that might be done. Consequently, it is hereby declared to be the public policy of this State that public entities shall only be liable for their negligence within the limitations of this act and in accordance with the fair and uniform principles established herein. All of the provisions of this act should be construed with a view to carry out the above legislative declaration.

STATEMENT OF THE CASE

The instant action was filed by a non-tenured teacher who contended in her complaint that the Lincoln Park Board of Education had violated her constitutional rights under the First Amendment by deciding not to renew her employment contract as a result of activities which were constitutionally protected. Petitioner's previous challenge to the administrative decision was dismissed by the New Jersey Commissioner of Education at the conclusion of Petitioner's case as a result of the Board's Motion to dismiss, and the Board was not required to go forward and introduce evidence to support its position.

While the instant action was pending in Federal Court, the Board of Education moved for a summary judgment dismissing the complaint on several grounds, one of which was that more than two years had elapsed between the notification to the petitioner that her contract of employment would not be renewed and the filing of the complaint which initiated the instant litigation. The United States District Court granted the Board's request and entered an order for summary judgment based upon the language of the two year statute of limitations in the New Jersey Tort Claims Act. The decision was affirmed without opinion by the United States Court of Appeals for the Third Circuit.

REASONS FOR GRANTING WRIT

It is respectfully submitted that the decision of the United States District Court which was affirmed by the United States Court of Appeals, improperly granted the Board of Education a summary judgment based upon the statute of limitations applicable to public bodies as set forth in the New Jersey Tort Claims Act. Since Congress did not establish a statute of limitations for actions brought in federal courts under 42 U.S.C. 1983, the Supreme Court has repeatedly determined that the District Court should borrow the state law of limitation governing an analogous state cause of action. See, *e.g.*, *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975). The petitioner herein contends that although the District Court correctly looked to the New Jersey statutes in considering the request for summary judgment, it is contended that the wrong statutory period was utilized.

Initially, it is pointed out that the District Court determined that the New Jersey statute of general limitation, *N.J.S.A.* 2A:14-1 which provides for a six year limitation period, would be the appropriate statute absent the adoption of the New Jersey Tort Claims Act (4a). The court, however, then chose to disregard the "analogous" statute of general application and instead utilized *N.J.S.A.* 59:8-8 which prescribes a two year statutory period applicable to public entities. In so doing, it is contended that the process utilized by the District Court for selection of the appropriate statute of limitations was incorrectly predicated upon the "identity" of the defendant rather than the "nature" of the cause of action.

The *de facto* result of the process utilized by the District Court creates a form of "qualified immunity" which insulates a public body in New Jersey from claims under

42 U.S.C. 1983 after two years while public officials in New Jersey are subjected to the six year period based on the "analogous" cause of action theory. In addition to creating an illogical distinction between defendants, the decision of the District Court was rendered prior to *Owen v. City of Independence*, 63 L.Ed.2d 673 (1980) which abolished qualified immunity for a municipality under the Civil Rights Act, which question had been left open in *Monell v. New York City Dept. of Soc. Serv.*, 437 U.S. 658 (1978).

It is particularly salient for the Supreme Court to note that in Justice Powell's dissent in *Owen, supra*, he pointed out sections of the New Jersey Tort Claims Act, among sections of other state statutes, as being of questionable validity after the majority decision. To now utilize a section of the New Jersey Tort Claims Act to narrow responsibility under the Civil Rights Act would seem to fly directly in the face of the majority decision in *Owen*. By setting up different limitations periods for the same cause of action based upon the identity of the defendants, the reasoning of the District Court would also seem to fly in the face of the rationale in *Monell, supra*, which overruled the holding in *Monroe v. Pape*, 365 U.S. 167 (1961) that a public body was not a "person" within the meaning of 42 U.S.C. §1983.

Finally, the holding of the District Court, would inevitably result in the potential of duplicitous litigation. Since under the District Court holding, the limitation period would be determined by the identity of the defendants, an action dismissed against a public body because of the two year limitation period, could be reinstituted against the individual defendants in the original action for up to six years. *See e.g., Gipson v. Township of Bass River*, 82 F.R.D. 122, 129 (D.N.J. 1979).

If the Supreme Court should determine that the District Court correctly selected the appropriate limitation in this action, it must then consider whether *N.J.S.A.* 59:8-8 is the type of law which under 42 U.S.C. §1988 is inconsistent with the federal policy underlying the cause of action under consideration. The Court would, of course, have jurisdiction under the aforestated federal statute to disregard a state law if it determines it to be consistent with the Constitution and the congressional intent of the Civil Rights Act.

Another concern of the Supreme Court in considering this petition should be the appropriateness of utilizing the New Jersey Tort Claims Act in actions brought under the Civil Rights Act. One need only refer to the definitions section of the act, *N.J.S.A.* 59:1-3, which defines "injury" in a fashion that clearly evidences that the drafters of the legislation had no intention that the act should apply to claims brought under the Civil Rights Act. Further, *N.J.S.A.* 59:1-2 indicates that the legislature of New Jersey intended that public bodies be liable for their "negligence" within the framework of the act. It would appear patently clear that the act was never intended to, nor should it be extended to actions representing the deprivation of constitutional rights and the damages flowing therefrom. The limitation section of the New Jersey Tort Claims Act should be no more applicable to Civil Rights Act litigation in the federal courts than the notice provisions of a state tort claims act which have been determined to be inapplicable. See, *e.g.*, *Donovan v. Reinbold*, 433 F.2d 738 (9th Cir. 1970).

CONCLUSION

Wherefore, the petitioner respectfully requests that the Supreme Court grant the petition for certiorari to consider the issues raised herein, and the ramifications of the decision for which review is herein sought.

Respectfully submitted,

CHAMLIN, SCHOTTLAND,
ROSEN & CAVANAGH,
Attorneys for Petitioner

By: /s/ Michael D. Schottland
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APPENDIX

MEMORANDUM

Re: O'Biso v. Lincoln Park Board of Education, Civ. 78-2991

This is a suit by a non-tenured school teacher who had been hired for one school year, 1974-75. On April 15, 1975, the Board voted not to hire O'Biso for the 1975-76 year, and on May 29, 1975, decided not to alter its action after having given O'Biso an opportunity to be heard on the question. There is, of course, no federal constitutional right to have a hearing before deciding not to rehire a non-tenured teacher, *Board of Regents v. Roth,* 408 U.S. 564 (1972), even though local law requires a statement of reasons to be given on request, as was done here.

The claim is evidently grounded on *Mt. Healthy v. Doyle,* 429 U.S. 274 (1977) and on *Monell v. Department, etc.,* 437 U.S. 658 (1978), which overruled so much of *Monroe v. Pape,* 365 U.S. 167 (1961) as had ruled that a municipality for local government was not a "person" within the meaning of 42 U.S.C. §1983.

Mt. Healthy is implicated for two reasons. One, the claim was grounded on an alleged failure to rehire because of a teacher's phone call to a local radio station criticising a freshly announced school dress code and the ensuing treatment of the item as a news bulletin. The Supreme Court ruled, on this point, that the teacher could not prevail if the Board could show by a preponderance that the teacher's exercise of free speech rights was not a substantial or motivating factor in the decision not to rehire, i.e., that it would have reached the same decision even in the absence of the protected conduct. The present case differs from *Mt. Healthy* in that O'Biso had already been told

she would not be rehired before the allegedly protected conduct occurred, even though formal Board action had yet to be taken.

The second reason is that when Mt. Healthy was decided, the rule of *Monroe v. Pape*, was still in force and the Board could not be sued as a "person" under §1983. But, since the Mt. Healthy complaint claimed under both §1983 and under the 1st and 14th Amendments, there could be jurisdiction under 28 USC §1331, so long as the Board there was not a state agency entitled to immunity from suit under the 11th Amendment. On review of the Ohio law, the court ruled that the Board was more like a county or a city than like an arm of the State, and so was not entitled to immunity under the 11th Amendment.

That point is not addressed or considered here, and the question remains open. Note that a county board of taxation is regarded as an agency of the State and as a "state board" under local law. *Baldwin, etc. v. Essex, etc.*, 27 N.J. Super. 240 (App. Div. 1953); *Warren v. Hudson County*, 135 N.J.L. 178 (E. & A. 1947). Thus, the Board here may or may not be a state agency, state board or arm of the State such as to bring it within the 11th Amendment. The point is noted but not decided.

There is also a question of res judicata or collateral estoppel. O'Biso did initiate statutory proceedings before the Commissioner of Education and the State Board of Education, in which the very issue raised here was presented and decided against her. The next step in that process was to have the State agency action reviewed through the common law writ of certiorari, now guaranteed as of right in civil cases under the 1947 N.J. Constitution, but handled in the form of an "appeal" to the Superior Court, Appellate Division. However, that step was taken out of time [45 days under N.J. Court Rule R.2:4-

1(b)] and on February 2, 1978 a request for extension of time was denied and the judicial proceeding was dismissed. The Supreme Court of New Jersey denied certification.

New Jersey's judicial structure and Rules of Court are designed to enable the court to consider and decide all disputes between the parties in a single action. There are very few exceptions, none pertinent here, to the joinder of claims, remedies and parties. This is so even when one of the forms of relief sought is prerogative writ relief and another is damages. This has led to the development of a strong "single controversy doctrine", which requires a party to advance all claims for relief (at least when related in some fashion) in the same action. For a recent collection of the precedents, see *Trevis v. Trevis*, 79 N.J. 422 at 434 (1979).

Since Mt. Healthy had been decided January 11, 1977, nothing stood in the way of O'Biso's joining both the prerogative writ review and a Mt. Healthy claim under both federal and state constitutions. Hence, the final decision of the State Board, on the merits of the very issue raised here, stands unimpeached and may not be open to collateral attack on principles of res judicata and collateral estoppel. Certainly, the New Jersey courts had concurrent jurisdiction with this court for both a §1983 claim and a federal/state constitutional claim, see *Peper v. Princeton*, 77 N.J. 55 (1978).

In any event, despite these principles, the court finds it unnecessary to decide the point because the claim is barred, in any event, by the applicable statute of limitations.

The challenged action occurred April 15, 1975. Suit was not filed here until December 11, 1978, nearly 32 months later. The decision to file here was no doubt sparked by the decision in *Monell*, a 1978 ruling, but if the statute had already run, the decision in *Monell* is of no aid.

The main dispute between the parties focuses on the selection of the proper statute. O'Biso claims the benefit of N.J.S.A. 2A:14-1, a general statute of limitations requiring suit within 6 years. The Board relies on N.J.S.A. 59:8-9, a two-year statute that applies when the defendant is a "public entity", a term so defined by N.J.S.A. 59:1-3 as to include the Board.

Absent any other statute to consider, the general 6 year statute, N.J.S.A. 2A:14-1 would seem to apply. Given the 2 year statute applicable to suits against "public entities" in N.J.S.A. 59:8-9, an evaluation of the two is required.

The 2-year statute is part of P.L. 1972, c.45, enacted in response to a series of decisions culminating in *Willis v. Dept. etc.*, 55 N.J. 534 (1970) in respect to tort liability, and *P.T. & L. Construction v. Comm'r.*, 55 N.J. 341 (1970), 57 N.J. 439 (1971), and 60 N.J. 308 (1972) in respect to contract liability.

P.L. 1972, c. 45 has two subdivisions. The first part (directly applicable here) is the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 et seq. through 59:12-3. The second part is the New Jersey Contractual Liability Act, N.J.S.A. 59:13-1 to 10.

Although the *Willis* and *P.T. & L.* cases dealt with the sovereign immunity of the State under local law, P.L. 1972 c. 45 addressed the tort and contract liability of all forms of "public entity" from the State itself on down, and embraced public employees as well as entities. The statute, then, is comprehensive in cases where the defendant is a public entity or public employee.

The tort claim portion of the statute applies to injury to person or property, including death, that would be actionable if inflicted by a private person. See definition of "injury" in N.J.S.A. 59:1-3. For contract claims, the limita-

tions is 2 years of accrual or 1 year after completion of the contract giving rise to the claim, whichever is later, N.J.S.A. 59:13-5(b).

The Tort Claims Act is prospective; i.e., it applies only to claims that accrue on or after its effective date (such as this one). Earlier accrued claims are to be governed by pre-existing law, except for the *Willis* case. See N.J.S.A. 59:12-3.

For the contract liability portion, the time limitations of N.J.S.A. 59:13-5 do not apply to existing accrued claims, so long as suit is filed within 6 months after the effective date of the act, N.J.S.A. 59:13-10.

The legislative pattern is plain. Whether arising in contract or tort, new claims arising are governed by the time limitations of P.L. 1972, c.45 when the claim is against a "public entity" or public employee. If the Legislature were satisfied with the general statutes of limitation in N.J.S.A. 2A:14-1 and 2, it would have had no need to deal with the subject at all. Obviously, it chose to do so, and chose to set 2 years for all tort claims that otherwise would be governed by the general 6-year or 2-year statutes, and 2 years (or 1 year from completion of the contract) for contract claims instead of the general 6-year statute.

The selection made by the Legislature turns on the identity of the defendant rather than the nature of the tort claims asserted. This is not a novel choice, as an inspection of Chapter 14 of Title 2A will disclose.

It could be argued that plaintiff could not sue the Board until *Monell* overruled so much of *Monroe* as held that local government units were not persons. There are two reasons why this is not so. First, a *Mt. Healthy* type suit could have been filed without the change ef-

fected by *Monell*. Second, the statute of limitations runs against a claim arising in respect to a party who may be immune from suit at the time. See *Tevis v. Tevis*, 79 N.J. 422 (1979) and cases cited.

This principle applies without regard to which statute of limitations applies. A change in the law of immunity from suit, or its equivalent, whether by statute or decision, does not provide the starting date for the running of limitations, whatever the period may be. To say otherwise would be to say that once *Monell* came down, all pre-existing claims against those held by *Monroe* not to be "persons" under §1983, would have a fresh period of limitation begin on that date, no matter how stale the claims. To so rule would be to defeat the fundamental nature of limitations as statutes of repose.

The applicable statute here, if the Board is not an arm of the State immune from suit under the 11th Amendment, is the 2-year statute of the New Jersey Tort Claims Act for tort actions against a public entity. That period had run out long before suit was filed here.

The other ground for summary judgment, which goes to the merits of the claim, need not be addressed for this reason. Summary judgment will be granted to defendant on the ground of the 2-year statute of limitation.

DATED: December 3, 1979.

/s/ Vincent P. Biunno,

U.S.D.J.

Original to Clerk
xc: All parties

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 80-1130

CHRISTINE O'BISO,

Appellant,

vs.

BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
C. A. No. 78-2991
ARGUED SEPTEMBER 19, 1980

BEFORE: ADAMS, HUNTER AND HIGGINBOTHAM,
Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Each side to bear its own costs.

BY THF COURT,

/s/
Circuit Judge

ATTEST:

/s/ Sally Mrvos
Sally Mrvos, Clerk

DATED: October 23, 1980.

Certified as a true copy and issued in lieu
of a formal mandate on November 14, 1980.

Test: Sally Mrvos

Clerk, United States Court of Appeals
for the Third Circuit

COMMISSIONER OF EDUCATION

CHRISTINE O'BISO,

Petitioner,

vs.

BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY,

Respondent.

DECISION

SYNOPSIS

Petitioner, nontenured art teacher, alleged Board's determination not to reemploy her was based on her attempts to solicit parental and pupil support and violated her constitutional right to free expression.

Commissioner held that Board's action was grounded in reasons set forth in letter sent to petitioner by Board president citing unsatisfactory classroom performance. Commissioner determined that Board had not prevented petitioner from speaking freely. Board's Motion to Dismiss was granted.

DATED: August 2, 1977.

CHRISTINE O'BISO,

Petitioner,

vs.

BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY,

Respondent.

HEARING EXAMINER REPORT

For the Petitioner, Chamlin, Schottland, Rosen & Cavanagh (Michael D. Schottland, Esqs., of Counsel)

For the Respondent, Hoffman, Fiorello and Hallock (Joseph A. Hallock, Esq., of Counsel)

Petitioner, formerly employed as a teacher of art by the Board of Education of the Borough of Lincoln Park, hereinafter "Board," alleges that the Board's action of not reemploying her for the 1975-76 academic year is based on constitutionally proscribed reasons and demands immediate reinstatement to her former position of employment. The Board denies the allegations and asserts that its determination not to reemploy petitioner for the 1975-76 academic year is in all respects proper and legal.

A hearing was conducted in the matter on March 29, 1976 at the office of the Morris County Superintendent of Schools by a hearing examiner appointed by the Commissioner of Education. The Board moved at the conclusion of petitioner's case to dismiss the matter for failure to establish, *prima facie,* a cause of action upon which relief may be granted. Thereafter, the Board filed a Brief in

support of its Motion to Dismiss and Petitioner filed a Brief in Opposition thereto. The report of the hearing examiner is as follows:

Petitioner was first employed by the Board for the 1974-75 academic year. The President of the Board advised Petitioner by letter dated April 30, 1975, in response to her written request, that the Board acted not to reemploy her for 1975-76 for the following reasons:

> "1. Insufficient protection of school property during the past year; in particular, vandalism of the Art Room which took place during your class teaching time.
>
> "2. Unsatisfactory classroom performance during the past year; in particular, failure to maintain proper control and discipline of your pupils.
>
> "3. Inadequate care of school equipment and furnishings during the past year; in particular, failure to maintain a proper appearance in the Art Room in Chapel Hill School.
>
> "4. Conduct unbecoming a professional during the past year; in particular, your efforts to actively enlist the support of your pupils in the cause of your continued employment by the Board of Education.
>
> "5. The doubts expressed by your Building Principals concerning the continuation of your employment by the Board of Education." (P-17)

Petitioner testified that she had been assigned to teach grades two through six at the Board's Pinebrook School and grades six through eight at the Chapel Hill School. Petitioner was assigned an Art Room at the Chapel Hill School, while at Pinebrook she traveled from classroom to classroom to teach art. Petitioner testified that at the be-

ginning of the 1974-75 academic year her pupils at the Chapel Hill School were disruptive and inattentive in her class. Petitioner also testified that her pupils broke the chalkboard, the clock, the leg of a table, and the light switch in the art room while she was present. Petitioner explained the pupils also ripped the classroom drapes, threw shreddi-mix (an art compound) on the ceiling, and defaced the classroom walls (Tr. 72-73, 111). The pupils engaged in these activities primarily between the opening of school in September until late November when the classroom walls were defaced (Tr. 111).

Petitioner testified that she became concerned about her employment when she learned the Board had been discussing the topic of vandalism in her art room at either its October or November meeting. Petitioner testified she submitted a progress report of her teaching, of her art room discipline, and of the condition of the art room to the Chapel Hill School principal on November 25, 1974, not because the principal requested such a report, but because of her concern that the Board was discussing the condition of the art room (Tr. 26). Petitioner states in this report (P-7) that her discipline problems in the first four weeks of school included the following: pupils ignored her when she took attendance; pupils acted in groups to distract her while she worked with other pupils; several pupils tried to close another pupil's head in a vise when that pupil volunteered to assist her in a task; pupils threw shreddi-mix at the ceiling and walls and those responsible climbed out the windows instead of remaining after class to clean up; pupils flew paper airplanes in the classroom, crushed crayons on the floor, sat on the window sills, pulled shrubs from outside the windows into the classroom, poked each other with pencils, deliberately spilled water on the

floor, broke the glass on the wall clock; one pupil deliberately broke the leg of a table in the classroom and physically threatened her unless she allowed him to leave the class; her money and her lunch were stolen in class; and one pupil attempted to cut another pupil's finger off with a paper cutter. Petitioner also reports that during the first four weeks of school a combination lock was sawed off a closet door; chairs were thrown from one end of the room to the other; pupils wrote on walls, hit her on the head and on the jaw with a metal pointer; several pupils threatened to let the air out of her automobile tires; and, finally, a pupil deliberately spilled a quart of red poster paint on the classroom floor and other pupils began running and skidding into the spilled paint (P-7). Petitioner concludes this report by asserting that she had made progress in her teaching and in classroom discipline and was receiving compliments from parents about her teaching.

Petitioner testified that when she became concerned about continuing or renewed employment, she began telephoning parents to request them to either call or write letters to the Board for the purpose of telling the Board that they considered her to be an effective teacher (Tr. 33-34, 82-83).

The hearing examiner observes that two evaluations were prepared upon petitioner's teaching performance between September 27, 1974 and December 6, 1974. The first evaluation (P-2) was prepared by the Chapel Hill School principal while the December evaluation (P-3) was prepared by the principal of Pinebrook School. Petitioner testified that the Chapel Hill principal had agreed that perhaps his evaluation of September 27 was made in haste and that he further agreed to remove that evaluation from her file. Petitioner testified that when she discovered the evaluation was not removed by the beginning

of October 1974, she complained to the then Superintendent, since replaced by an acting Superintendent, who himself removed the document (P-2) from her file in her presence (Tr. 21-22). In both documents, petitioner's lack of discipline and pupil supervision is notable.

Petitioner testified that around Christmas 1975 the chalkboard which had been broken earlier by the pupils became worse until the entire middle section of the board was gone. Petitioner testified her pupils made candles and sold them in the neighborhood to help defray the cost of replacing the chalkboard. Petitioner testified that when she advised the Board by letter (C-1) dated February 3, 1975 that the pupils had earned fifty dollars for this purpose, she was told by the Board to return the money to the pupils (Tr. 24).

Petitioner was evaluated again on March 7, 1975 by the Pinebrook School principal. Petitioner's lack of lesson structure and pupil discipline were again addressed (P-5). The principal of Chapel Hill evaluated petitioner's performance on March 25, 1975, and while some weaknesses are noted, the principal asserts that petitioner made progress during the year. He further stated he would recommend her for employment during 1975-76 (P-6). In fact, both school principals recommended petitioner be reemployed for 1975-76 by memoranda dated March 20, 1975 (P-10-11).

Petitioner testified she conducted an art show on the evening of April 2, 1975 at which the art work of her pupils was shown. The show was conducted on the stage of the gymnasium which was cluttered with gymnasium equipment. Petitioner testified that in order to conduct the art show, she had to move the gymnasium equipment to her classroom which, in turn, cluttered her classroom (Tr. 31).

Petitioner testified that several Board members who attended the art show visited her art room the same evening and saw the room disorganized as hereinbefore described (Tr. 32). Petitioner also testified that several parents had expressed their appreciation to her for her effective work after the art show. In response to the parents' queries whether they could do anything for her, she advised them to again write letters or call the Board members on her behalf (Tr. 33).

Petitioner testified she knew that the Board planned to meet in private session on April 8, 1975 to discuss reemployment of nontenure teachers (Tr. 89). She further testified that she arranged with the Acting Superintendent to telephone her after the meeting to determine whether the Board was planning to offer her reemployment (Tr. 81). Petitioner testified that in anticipation of the Board's private session scheduled for April 8, 1975, she submitted an unsolicited memorandum (C-2) to the Acting Superintendent on April 7, 1975 in which she stated what she perceived to be her progress as a teacher during the 1974-75 academic year.

Petitioner testified that subsequent to the conclusion of the Board's private meeting on April 8, 1975, the Acting Superintendent telephoned her at one A.M. on April 9, as previously arranged, and informed her that her employment would probably not be renewed for 1975-76. Petitioner then testified that the Acting Superintendent informed her that the call was official notice she would not be reemployed (Tr. 35-36).

The hearing examiner observes that the Board had not yet determined whether to continue petitioner's employment. Furthermore, *N.J.S.A.* 18A:27-10 requires written notice of nonreemployment from the Board.

Petitioner reported to school the next day, April 9, 1975, and informed her pupils that she was not to be employed for 1975-76. Petitioner testified that while she did not ask the pupils to do anything themselves, she did ask the pupils at Pinebrook and at Chapel Hill to have their parents again write letters or call Board members on her behalf (Tr. 38-39, 93). Although petitioner testified she advised pupils not to do anything with respect to her statement to them that she would not be reemployed, the fact is that the pupils were disruptive in school on April 9, 1975. Petitioner testified that pupils were walking out of classes, loitering in the halls, posting signs on school corridors which read "Save Miss O'Biso," and a pupil broke a window (Tr. 38, 44).

Petitioner testified that the Chapel Hill principal asked her to calm the pupils down. Petitioner testified she went to her classes that day and cautioned pupils that violence would achieve nothing. Rather, if they wished to assist her in her employment, they should have their parents call or write letters to the Board on her behalf (Tr. 39).

The principal of Chapel Hill recapitulated the events of April 9, 1975 in a memorandum (P-12) to the Acting Superintendent in which he concluded that the pupils were motivated by petitioner to be disruptive. The principal also reversed his earlier recommendation that petitioner be reemployed for 1975-76 to "• • • I additionally feel that [petitioner's] actions were selfish and not in the best interest of our school and community, and I cannot have people who use this method in my school • • •" (P-12). The principal of Pinebrook also filed a report of pupil activities on April 9, 1975 with respect to petitioner informing them the Board fired her and requesting that their parents write letters or call the Board on her behalf (P-13). Petitioner also prepared a report (C-4) to the

Superintendent in which she stated she stopped pupils on the way to school and told them she was not to be reemployed, that she told the same thing to pupils at Chapel Hill and at Pinebrook. In each instance, she was crying as she told the pupils. She denies deliberately using pupils to cause any disruption.

The Acting Superintendent, by letter (P-9) dated April 10, 1975, advised petitioner that the telephone call to her in the early morning of April 9, *ante*, was not official notification of non-reemployment. Petitioner was advised that such determination was solely that of the Board which would make its determination on April 15, 1975. The Acting Superintendent did advise as follows:

> "° ° ° I did indicate to you, however, that it appeared to me, that based upon the discussions which took place at the Board Work Meeting on Tuesday, April 8, 1975, there is a substantial risk that a vote upon the question of whether to offer you a contract or not will be decided adversely to you. I did ask you whether you wished, under the circumstances, to indicate in a letter that you would not be available for employment within the district next school year. This request was made out of consideration of professional comity. ° ° °" (P-9)

Petitioner was invited to appear before the Board, privately, before the public meeting on April 15, 1975. (P-14) Petitioner testified that she and her representatives did appear at the private meeting at which she did all the talking. The Board said nothing (Tr. 46).

The agenda (P-15) for the public meeting of April 15, 1975, contained a proposed resolution by which petitioner and seven other teaching staff members would be offered

reemployment for 1975-76. Petitioner testified that she attended the public meeting which was also attended by approximately 200 persons, compared to a normal attendance, in her judgment, of about two or three persons (Tr. 46-47).

The minutes of the April 15 meeting show that

> "° ° ° Considerable discussion took place involving students, parents, teachers and members of the Board of Education concerning the continuation of employment of [petitioner] ° ° °. Public sentiment generally favored renewal of contract for this employee.° ° °" (P-16, at p. 180).

Thereafter, the resolution to reemploy petitioner for 1975-76 was defeated by a vote of six to three (P-16, at p. 18). Three of the six members who voted not to reemploy petitioner expressed concern over the letters received from parents on behalf of petitioner, appeals from pupils on her behalf and, in general, what may be considered to be the members' perception of public pressure on them to renew petitioner's employment for 1975-76. Two of these three members stated that their decision not to reemploy petitioner was based on the total information in their possession with respect to petitioner's teaching performance and was not based on public pressure. The third member, after expressing his concerns over the "° ° ° campaign to save Miss O'Biso° ° °," voted in the negative (P-16, at p. 188). The other three members who voted negatively had no comments attributed to them in the official minutes prior to casting their votes.

Thereafter, petitioner requested and was given the reasons for her non-reemployment, *ante*, and petitioner was given an informal appearance before the Board on May 29, 1975. The Board advised petitioner thereafter that it had not changed its mind.

Petitioner alleges that her constitutional right to free expression was violated because three Board members, prior to voting in the negative, expressed concern over the pupil and parental pressure to have the Board reemploy her. Petitioner also alleges that the Board improperly considered the evaluation (P-2) of the Chapel Hill principal, dated September 27, 1974, which had been removed from her file. Petitioner asserts that her nonrenewal of employment must be set aside because one of the stated reasons for the action is a charge of conduct unbecoming which demands a plenary hearing before the Commissioner.

The Board moves for dismissal of the matter grounded on petitioner's failure to state a cause of action upon which relief could be granted. The Board argues that the constitutional right to free expression guarantees the right to speak out on issues of public concern. The Board asserts that, in the instant matter, petitioner's efforts to secure the aid and assistance of her pupils to achieve reemployment was not an issue of public concern; rather, petitioner attempted to use the cloak of constitutional protection to improperly turn her classroom into a forum for her own selfish interest. The Board asserts that petitioner's behavior of soliciting outside support to pressure it into reemploying her, on factors other than its consideration of her teaching performance, is contrary to the harmonious relationships necessary for the successful operation of the educational system. The Board argues that it did not violate petitioner's constitutional right to free expression under these circumstances and cites *Pickering v. Board of Education of the Township High School District, 205, Will County, Ill.*, 391 U.S. 563, 88 S. Ct. 1731, 20 L.Ed.2d 811 (1968); *Pietrunti v. Board of Education of the Township of Brick*, 128 N.J. Super. 149 (App. Div. 1974), *certif. den.* 65 N.J. 573 (1974), *cert. den.* 419 U.S. 1057 (1974).

The hearing examiner has reviewed the testimony of petitioner, selected portions of depositions submitted by petitioner, and the documentary evidence and finds petitioner did, in fact, fail to state a cause of action upon which relief could be granted. Petitioner's claim of infringement of free expression is found to be without merit. There is no evidence to establish that either the Board or its agents ever directed petitioner to refrain from speaking freely. That she chose the forum of the classroom and school facilities, in addition to the forum of parental pressure, does not constitute the exercise of freedom of speech. Petitioner spoke freely to those who would listen.

It is established that a balance must be struck between a teacher's interest in speaking freely and the interest of the State in promoting efficiency of its educational system. *Winston v. Board of Education of South Plainfield*, 64 N.J. 582 (1974). The Board, regardless of its determination with respect to petitioner's reemployment, still had to operate its schools. The efficiency of its schools can only be lessened when pupils become disruptive and attempts are made to bring outside pressure on the Board for selected and biased decisions. The Legislature saw fit to create safeguards for nontenure teachers whose employment is not renewed. *N.J.S.A.* 18A:27-10 *et seq.* The New Jersey Supreme Court addressed procedures for boards to use regarding non-reemployment of teachers. *Donaldson, supra.* Petitioner had avenues of relief which she exercised.

The Board did not place an unconstitutional prior restraint on petitioner to speak freely as was the case in *River Dell Education Association v. River Dell Board of Education*, 122 N.J. Super. 350 (Law Div. 1973). Consequently, petitioner's reliance on that case in opposition to the Motion to Dismiss is misplaced.

The Board had sufficient reason to support its determination not to reemploy petitioner without considering the evaluation of the Chapel Hill principal dated September 27, 1974. Consequently, petitioner's argument that the Board considered that evaluation is without merit.

Petitioner's argument that she is entitled to a plenary hearing on the charge of unbecoming conduct is without merit for such a hearing is reserved for those who have acquired a tenure status. *N.J.S.A.* 18A:6-10; 18A:28-5; *Donaldson, supra.*

The hearing examiner finds no basis to petitioner's claim that the Board acted improperly or illegally with respect to her non-employment for 1975-1976. It is therefore recommended that the Board's Motion to Dismiss be granted and that the Commissioner dismiss the Petition.

This concludes the report of the hearing examiner.
April 22, 1977.

* * *

The Commissioner has reviewed the record in the instant matter, including the report of the hearing examiner and the objections filed thereto by petitioner.

Petitioner's objections to the hearing examiner's report focus on assertions that her employment was not continued by the Board because of the vocal participation by parents and pupils on her behalf to persuade the Board to continue her employment. Petitioner reasons that, because any communication she may have had with parents or pupils with respect to her non-reemployment is constitutionally protected free speech, the Board may not deny her reemployment for such reasons.

The Commissioner does not agree that petitioner's employment was not continued by the Board in violation of

her constitutional rights. It is acknowledged that substantive due process demands that petitioner's employment not be terminated if the reason was the exercise of her constitutional right of free speech. The Board's determination not to continue petitioner in its employ is grounded in the reasons set forth in the letter to her dated April 30, 1975 from the Board President (P-17, *ante*). Although reason number four takes issue with the fact that petitioner sought to involve her pupils in her efforts to attain reemployment, this does not, under the total circumstance herein, rise to the level of protected free speech.

The Commissioner adopts as his own the findings of fact and conclusions of law set forth by the hearing examiner.

Petitioner has not shown any substantial reason to grant an adversary hearing. *Winston v. Board of Education of South Plainfield*, 125 N.J. Super. 131 (App. Div. 1973), *aff'd* 64 N.J. 582 (1974).

Accordingly, the Board's Motion to Dismiss is granted. The Petition of Appeal is dismissed.

/s/ Ralph H. Latrille
Acting Commissioner of
Education

August 2, 1977.

STATE BOARD OF EDUCATION DECISION

CHRISTINE O'BISO,

Petitioner-Appellant,

vs.

BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY,

Respondent-Appellee.

Decided by the Commissioner of Education, August 2, 1977.

For the Petitioner-Appellant, Chamlin, Schottland, Rosen & Cavanagh (Michael D. Schottland, Esq., of Counsel)

For the Respondent-Appellee, Hoffman, Fiorello and Hallock (Joseph A. Hallock, Esq., of Counsel)

The State Board of Education affirms the decision of the Commissioner for the reasons expressed therein.

November 9, 1977.

ORDER
(Filed February 2, 1978)

Before Part E Judges: Halpern, Larner and King.

Moving Papers filed—January 10, 1978.

Answering Papers filed—January 25, 26, 1978.

Date Submitted to Court—January 30, 1978.

Date Decided—February 1, 1978.

This matter having been duly presented to the Court, it is hereby Ordered as follows:

Motion to File Notice of Appeal as Within Time denied.

For the Court:

/s/ Joseph Halpern,
JOSEPH HALPERN, P.J.A.D.

Witness, the Honorable Joseph Halpern, Presiding Judge of Part E, Superior Court of New Jersey, Appellate Division, this 1st day of February 1978.

/s/ Elizabeth McLaughlin
Clerk of the
Appellate Division

I hereby certify that the foregoing
is a true copy of the original on file
in my office.

/s/ Elizabeth McLaughlin
Clerk